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DEPARTMENT OF STATE

[Public Notice 7990]

Certification Related to the Khmer Rouge Tribunal

Pursuant to the authority vested in me under Section 7044(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Division I, P.L. 112-74) (SFOAA) and Delegation of Authority 245-1, I hereby certify that that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the Extraordinary Chambers in the Courts of Cambodia (also known as the “Khmer Rouge Tribunal”).

This Certification shall be published in the *Federal Register*, and sent, along with related Memorandum of Justification, to the appropriate committees of the Congress.

August 13, 2012

Date

Thomas R. Nides
Deputy Secretary
for Management and Resources

Section 7044(c) of the Department of State, Foreign Operations Appropriations
Act, 2012 (Div. I, P.L. 112-74)

Funding for the Extraordinary Chambers in the Courts of Cambodia

Sec. 7044(c) Cambodia. – Funds made available in this Act for a United States contribution to a Khmer Rouge tribunal may only be made available if the Secretary of State certifies to the Committees on Appropriations that the United Nations and the Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the tribunal.

MEMORANDUM OF JUSTIFICATION
FOR CERTIFICATION RELATED TO THE KHMER ROUGE TRIBUNAL
UNDER SECTION 7044(c) OF THE DEPARTMENT OF STATE, FOREIGN
OPERATIONS AND RELATED PROGRAMS APPROPRIATIONS ACT, 2012

Section 7044(c) of the Department of State, Foreign Operations and Related Program Appropriations Act, 2012 (Div. I P.L. 112-74), provides that funds appropriated by that act for a United States contribution to the Extraordinary Chambers in the Courts of Cambodia (ECCC, also known as the Khmer Rouge Tribunal) may only be made available if the Secretary of State certifies to the Committees on Appropriations that the United Nations (UN) and Royal Government of Cambodia (RGC) are taking credible steps to address allegations of corruption and mismanagement within the ECCC. Deputy Secretary Nides has signed the certification pursuant to State Department Delegation of Authority 245-1.

Background

The ECCC, which began operations in 2006, was established as a national court with UN assistance to bring to justice senior leaders and those most responsible for the deaths of as many as two million Cambodians under the Khmer Rouge regime, which was in power from April 17, 1975 until January 6, 1979. In 2010, the ECCC completed its first case (Case 001), convicting Kaing Guek Eav (aka “Duch”), former chief of the Tuol Sleng torture center, of crimes against humanity and war crimes, and sentenced him to 35 years in prison. Duch’s trial

was the first attempt in three decades to hold a Khmer Rouge official accountable for that era's atrocities and was a milestone in the history of Cambodian justice. In February, 2012 the ECCC's Supreme Chamber upheld that conviction, and extended Duch's sentence to life in prison. The United States, other foreign governments, and non-governmental organizations (NGOs) monitoring the ECCC agree that proceedings throughout met international standards of justice. In September, 2010, the four surviving senior leaders of the Khmer Rouge, including Nuon Chea ("Brother Number 2"), were indicted on a variety of charges ("Case 002"), including crimes against humanity, grave breaches of the Geneva Convention, and genocide. The trial commenced in November 2011. In response to pre-trial motions, Ms. Ieng Thirith, the Khmer Rouge's Minister of Social Affairs, was found mentally incompetent to stand trial. She has not been released from custody, as treatment is underway to see if her condition can be sufficiently improved to allow her to stand trial. Investigations by the ECCC's Office of the Co-Investigating Judges commenced in September, 2009 against three suspects ("Case 003") and no final decision has been made regarding the legal question of whether the suspects and their alleged crimes fall within the jurisdiction of the ECCC. Two additional suspects ("Case 004") are also being investigated.

Factors Justifying Certification

From the time the ECCC commenced operations in 2006, there have been allegations of corruption on the administrative side of the court, primarily in the form of salary kickback schemes affecting Cambodian staff members. These allegations received widespread attention from U.S. and international media, and concerns about corruption led many to question the ECCC's ability to deliver justice. In late 2008, at the request of the United States and other donors, the RGC

removed the Cambodian head of administration, the person most associated with the corruption scheme. His replacement, Tony Kranh, who remains the Acting Director today, has been competent and has cooperated well with the donor community, the ECCC officials, and the UN Office of Legal Affairs.

The ECCC, in cooperation with the UN, has taken additional steps to protect the integrity of its proceedings against corruption. In August 2009 the UN and RGC reached an agreement to establish an Independent Counselor, which is semi-autonomous from the Tribunal's administration, the UN, the RGC and donor states, to hear and address corruption allegations at ECCC. The guidelines established confirm the Independent Counselor's obligations to protect the confidentiality of complainants, ensure that there are no reprisals for whistleblowing, and provide a report of his activities to both the UN and RGC. Addressing the ECCC in October 2010, the Secretary General commended the work of the Independent Counselor and the effect that office has on the public perception of the ECCC – that the Tribunal's administration will not tolerate any form of corruption.

These steps have led to increased confidence in the ECCC. The Human Rights Center of the University of California Berkeley conducted a survey in December 2010 across 125 Cambodian communes nationwide. The Center's final report, released on June 9, 2011, reveals that an increasing number of Cambodians have confidence in the court. A recent poll by the International Republican Institute found that 77 percent of Cambodians were aware of the proceedings at the ECCC.

Donor States, NGOs, and other monitors of the ECCC have expressed increased confidence in the proceedings as well. The Secretary General stated in

the fall of 2010 that “Beyond all doubt, the court has shown that it is capable of prosecuting complex international crimes in accordance with international standards.” In a resolution adopted at its 18th session (September 2011), the Human Rights Council reaffirmed the importance of the ECCC as an independent and impartial body, and welcomed the assistance of member states and the efforts of the Cambodian government to work with the UN to ensure the highest standards of administration are met.

In July 2010, the UN established the office of the Special Expert to the Secretary-General of the ECCC to provide advice and assistance to successfully managing this high-profile war crimes tribunal. In furtherance of this mandate, the Special Expert is tasked with monitoring, reporting, and addressing any and all administrative issues related to the ECCC’s functioning. The position was held from July 2010 to October 2011 by J. Clint Williamson, U.S. Ambassador-at-Large for War Crimes Issues from 2006-2009. Williamson was succeeded in January 2012 by David Scheffer, himself also a former Ambassador-at-Large for War Crimes Issues (1997-2001).

The ECCC provides a monthly report to the UN Controller and the UN Department of Economic and Social Affairs, which closely monitors the Tribunal’s activities, including its expenditures. In addition, all hiring on the international side of the ECCC is vetted by the UN Department of Economic and Social Affairs. The UN Office of Legal Affairs actively engages on judicial management issues. For example, the ECCC accepted the UN’s recommendation that the Pre-Trial Chamber sit on a full-time basis in order to improve the ECCC’s efficiency and to expedite its decision-making.

Since the appointment of the new ECCC administration, the creation of the Independent Counselor position, and the establishment of the UN's Special Expert Office, the United States has not learned of any credible allegations of corruption or mismanagement within the ECCC. Developments in Cases 003 and 004, while not related to corruption or mismanagement, do warrant examination.

In late April 2011, the ECCC's Office of Co-Investigating Judges (OCIJ) – at the time led by Cambodian national You Bunleng and German national Siegfried Blunk – ended its investigation into Case 003 and forwarded the evidence to the Office of the Co-Prosecutors. The international co-prosecutor, Andrew Cayley, dissatisfied with the amount and depth of evidence, requested the OCIJ to conduct further investigations and publicly released his request for additional investigation. This action led to a response from the OCIJ that appeared

to threaten Cayley with contempt for publicizing confidential matters. While the OCIJ subsequently made it clear that it did not seek to sanction Cayley, it also disagreed with Mr. Cayley's legal position and defended the adequacy of its factual investigations. While no closing order recommending dismissal was ever filed, ECCC's observers assess that the OCIJ supported dismissing the suspects from further investigation. Mr. Blunk came under intense criticism from outside observers and by some of his own office for his handling of Case 003, and a prominent international NGO alleged mismanagement and possibly misconduct. However, neither the NGO, nor missions by the UN's Office of Human Resource Management nor any other source has produced evidence that substantiates this allegation. Nevertheless, under increasing pressure, Mr. Blunk announced his resignation October 10, 2011, claiming that he was unable to carry out his duties due to political interference by the RGC.

It was expected that Mr. Blunk would be succeeded by Mr. Laurent Kasper-Ansermet of Switzerland, whom the UN had previously nominated and confirmed as the reserve co-investigative judge. It was the UN's legal view that Kasper-Ansermet's accession was to have been automatic. However, citing statements Mr. Kasper-Ansermet has published on Twitter prior to his nomination, the RGC refused to confirm him. After attempting to exercise his duties as reserve co-investigating judge for six months, Mr. Kasper-Ansermet tendered his resignation on March 19, 2012 citing his inability to gain the cooperation of the Cambodian national co-investigating judge, Mr. You Bunleng. Mr. Kasper-Ansermet's resignation was effective May 4, 2012. To replace Kasper-Ansermet, the UN nominated U.S. citizen Mark Harmon, a retired career U.S. Department of Justice prosecutor, who also served more than a decade as a Senior Trial Attorney in the Office of the Prosecutor of the International Criminal Tribunal for the former

Yugoslavia (ICTY). Unlike Kasper-Ansermet, the Cambodian Supreme Council of the Magistracy (SCM) confirmed Harmon in the position.

The ECCC's jurisdiction over suspects in the Cases 003/004 has yet to be resolved; and therefore the co-investigating judges have not made a final determination on whether these individuals should be indicted. Should the national and international co-investigating judges disagree, there is a formal process under the governing documents of the ECCC for resolving this disagreement in the Pre-Trial Chamber.

Before his departure, Kasper-Ansermet complained publicly that his investigation of Cases 003/004 has been obstructed by the non-cooperation of Cambodian-appointed judges and officials. Judge Bunleng publicly responded that the difficulties had arisen because Kasper-Ansermet had not been confirmed in his appointment due to the latter's public comments on confidential judicial matters. As Mark Harmon's nomination has been confirmed by the SCM, we anticipate that he will receive appropriate cooperation from national and international judges and officials. There may be disagreements about whether the suspects in Cases 003/004 should be subject to indictment and trial, but we expect these matters to be resolved by the co-investigative judges and the Pre-Trial Chamber in accordance with applicable law and procedure.

Certification and United States Policy Objectives

Certification recognizes the efforts of the UN and RGC to address allegations of corruption and mismanagement within the ECCC. It is not an indication, however, that work is complete. Both parties must continue to exercise

oversight of the ECCC's operations, and the donor community and NGOs must continue their vigilant engagement with the United Nations and the Royal Cambodian government to ensure that the ECCC remains judicially independent, corruption-free, and well-managed.

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